



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 219**

**[Docket DARS-2019-0034]**

**RIN 0750-AK43**

**Defense Federal Acquisition Regulation Supplement: Review of  
Defense Solicitations by Procurement Center Representatives  
(DFARS Case 2019-D008)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that provides limits on the scope of review by the Small Business Administration's procurement center representatives for certain solicitations awarded by or for DoD.

**DATES:** Effective **[Insert date of publication in the FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jennifer D. Johnson, telephone 571-372-6100.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published a proposed rule in the *Federal Register* at 84 FR 39256 on August 9, 2019, to implement section 1811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) and the Small Business Administration (SBA) proposed rule published in the *Federal Register* on December 4, 2018, at 83 FR 62516. Section 1811 limits the scope of review of DoD solicitations by SBA procurement center representatives. Additionally, section 1811 excludes these procurements from DoD's small business goals.

This final DFARS rule informs contracting officers that SBA procurement center representatives will not review acquisitions conducted by or for DoD, unless the contracting activity requests a review, if the acquisition is—

- For foreign military sales (see DFARS 225.7300);
- In support of humanitarian and civic assistance;
- In support of a contingency operation;
- Awarded pursuant to a Status of Forces Agreement or other agreement with the government of a foreign country in which U.S. Armed Forces are deployed; or
- Both awarded and performed outside the United States and its outlying areas.

SBA's final rule, published in the *Federal Register* on November 29, 2019, at 84 FR 65647, states that, unless the

contracting agency requests a review, procurement center representatives will not review such procurements.

There were no public comments submitted in response to the proposed rule. The final rule includes a minor change to the paragraph numbers in DFARS 219.502-1.

## **II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule does not create any new provisions or clauses or impact any existing provisions or clauses.

## **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **IV. Executive Order 13771**

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

#### **V. Regulatory Flexibility Act**

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule revises the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 1811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) and the SBA final rule published in the Federal Register on November 29, 2019, at 84 FR 65647. Specifically, the rule informs contracting officers that SBA procurement center representatives will not review acquisitions conducted by or for DoD, unless the contracting activity requests a review, if the acquisition is—

- For foreign military sales (see DFARS 225.7300);
- In support of humanitarian and civic assistance;
- In support of a contingency operation;
- Awarded pursuant to a Status of Forces Agreement or other agreement with the government of a foreign country in which U.S. Armed Forces are deployed; or

- Both awarded and performed outside the United States and its outlying areas.

In addition, section 1811 of the NDAA for FY 2017 excludes these procurements from DoD's small business goals.

This rule is necessary to implement section 1811 of the NDAA for FY 2017. The objective of this rule is to implement, in the DFARS, the limits provided in section 1811 on the scope of review by SBA procurement center representatives.

No public comments were received in response to the initial regulatory flexibility analysis.

This rule may impact small entities that are interested in performing the types of DoD contracts listed in section 1811 of the NDAA for FY 2017. According to the Federal Procurement Data System (FPDS), DoD awarded an average of 12,658 contracts and orders for performance outside the United States to approximately 1,292 unique small entities per year in FY 2016, 2017, and 2018. Approximately 4 percent of those small entities received awards for foreign military sales. About 8 percent received awards in support of a contingency operation. Approximately 81 percent received awards made pursuant to an agreement such as a Status of Forces Agreement.

FPDS does not currently collect data on the type of humanitarian operation identified in section 1811 (i.e., humanitarian and civic assistance), which is very different from

the "humanitarian or peacekeeping" operation defined in Federal Acquisition Regulation (FAR) 2.101 and used in the DFARS. FPDS does collect data on humanitarian or peacekeeping operations, as defined in FAR 2.101. FPDS shows that about 1 percent of the small entities performing contracts or orders outside the United States received awards for humanitarian or peacekeeping operations. The data collected may provide some indication of the number of small entities that could perform contracts or orders for the type of humanitarian operation identified in section 1811.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known, significant alternatives that would meet the requirements of the applicable statute.

## **VI. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### **List of Subjects in 48 CFR Part 219**

Government procurement.

**Jennifer Lee Hawes,**

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 219 is amended as follows:

**PART 219—SMALL BUSINESS PROGRAMS**

1. The authority citation for 48 CFR part 219 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Add section 219.402 to subpart 219.4 to read as follows:

**219.402 Small Business Administration procurement center representatives.**

(c)(i) *Authority.* This section implements section 1811 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328).

(ii) *Definition.* As used in this section—

*Humanitarian and civic assistance* means any of the following activities carried out in conjunction with authorized military operations in a foreign country:

(A) Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or underserved by professionals in those fields, including education, training, and technical assistance related to the care provided.

(B) Construction of rudimentary surface transportation systems.

(C) Well drilling and construction of basic sanitation facilities.

(D) Rudimentary construction and repair of public facilities. (10 U.S.C. 401(e))

(iii) *Exclusions.* Unless the contracting activity requests a review, SBA procurement center representatives will not review acquisitions conducted by or for DoD if the acquisition is—

(A) For foreign military sales (see 225.7300);

(B) In support of humanitarian and civic assistance;

(C) In support of a contingency operation;

(D) Awarded pursuant to a Status of Forces Agreement or other agreement with the government of a foreign country in which U.S. Armed Forces are deployed; or

(E) Both awarded and performed outside the United States and its outlying areas.

3. Revise section 219.502-1 to read as follows:

**219.502-1 Requirements for setting aside acquisitions.**

Do not set aside acquisitions—

(1) For supplies that were developed and financed, in whole or in part, by Canadian sources under the U.S.-Canadian Defense Development Sharing Program; or

(2) Excluded from procurement center representative review (see 219.402(c)(iii)).

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